MOTION FILED
JAN 26 1995

No. 94-1137

In The
# Supreme Court of the United States
October Term, 1994

AUTO-OWNERS INSURANCE COMPANY,
*Petitioner,*
-vs-
THORN APPLE VALLEY, INC.,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## MOTION
OF MICHIGAN ASSOCIATION OF INSURANCE COMPANIES
FOR LEAVE TO FILE BRIEF *AMICUS CURIÆ*
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI
~AND~
## BRIEF *AMICUS CURIÆ*, WITH APPENDICES

JAMES G. GROSS
*Counsel of Record*
GROSS, NEMETH & SILVERMAN, P.L.C.
*Attorneys for Amicus Curiæ*
444 Penobscot Building
Detroit, Michigan 48226
(313) 963-8200

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

No. 94-1137

In The

# Supreme Court of the United States

October Term, 1994

AUTO-OWNERS INSURANCE COMPANY,
*Petitioner,*

-vs-

THORN APPLE VALLEY, INC.,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## MOTION

OF MICHIGAN ASSOCIATION OF INSURANCE COMPANIES
FOR LEAVE TO FILE BRIEF *AMICUS CURIÆ*
IN SUPPORT OF PETITIONER, AUTO OWNERS INSURANCE COMPANY

Michigan Association of Insurance Companies (MAIC) moves for leave to file the attached brief *Amicus Curiæ* in this case. The consent of the attorney for Petitioner has been obtained. The consent of the attorney for the Respondent was requested, but refused.

*Amicus Curiæ*, Michigan Association of Insurance Companies, is a non-profit public affairs trade association of approximately 50 property-casualty insurance companies, 30 of which are domestic or Michigan-based companies. MAIC's members insure over 80% of the private passenger vehicles registered in the State of Michigan. One of the purposes of MAIC is to analyze and present its opinions concerning court decisions which affect the insurance industry and public.

MAIC's interest in this case arises from the fact that the Sixth Circuit's decision in the instant case invalidates coordination of benefits (COB) clauses in all no-

fault automobile insurance policies issued by its members to persons who are participants or beneficiaries of ERISA plans.

In the instant case, the Sixth Circuit justified its holding on the ground that it would protect the interests of ERISA participants and beneficiaries. (Petition for Writ of Certiorari, 10a-11a). However, no apparent consideration was given to the impact of that decision on the no-fault insurance premiums paid by ERISA participants and beneficiaries, who will no longer be permitted to purchase coordinated no-fault coverage. Neither party is in a position to address that matter, because the record does not contain any of the data necessary to do so. The brief which *Amicus Curiæ* seeks leave to file provides such data as well as an analysis of the financial impact the instant case will have on those intended to be protected by the ERISA.

Respectfully submitted,

By: _____

/s/ JAMES G. GROSS
*Counsel of Record*
*for Amicus Curiæ*

444 Penobscot Building
Detroit, Michigan 48226
(313) 963-8200

Dated: January 26, 1995

## TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES ..... ii

INTEREST OF *AMICUS CURIÆ*, MICHIGAN ASSOCIATION OF INSURANCE COMPANIES ..... 1

ARGUMENT:

THE SIXTH CIRCUIT'S DECISION IN THE INSTANT CASE WILL RESULT IN AN AGGREGATE ANNUAL INCREASE OF APPROXIMATELY $165 MILLION IN AUTOMOBILE INSURANCE PREMIUMS PAID BY MICHIGAN PARTICIPANTS AND BENEFICIARIES OF ERISA PLANS. ..... 2

CONCLUSION ..... 6

APPENDICES:

*APPENDIX 1* – 11/19/94 Memorandum from Terry Buckles to James Gross ... A-1

*APPENDIX 2* – 1/13/95 Letter from Terry Buckles to James Gross ... A-3

## INDEX OF AUTHORITIES

PAGE(S)

**CASE:**

*Northeast Department ILGWU Health & Welfare Fund* v. *Teamsters Local Union No. 229 Welfare Fund*, 764 M. 2d 147 (3rd Cir. 1985) ..... 5

**STATUTE:**

MCL 500.3109a; MSA 24.13109(1) ..... 3

No. 94-1137

In The

# Supreme Court of the United States

October Term, 1994

AUTO-OWNERS INSURANCE COMPANY,
*Petitioner,*

-vs-

THORN APPLE VALLEY, INC.,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF *AMICUS CURIÆ*
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### INTEREST OF *AMICUS CURIÆ*, MICHIGAN ASSOCIATION OF INSURANCE COMPANIES

*Amicus Curiæ*, Michigan Association of Insurance Companies (MAIC), is a non-profit public affairs trade association of approximately 50 property-casualty insurance companies, 30 of which are domestic or Michigan-based companies. MAIC's members insure over 80% of the private passenger vehicles registered in the State of Michigan. One of the purposes of MAIC is to analyze and present its opinions concerning court decisions which affect the insurance industry and public.

The Sixth Circuit decision in the instant case invalidates all coordination of benefits (COB) clauses in all no-fault automobile insurance policies issued by MAIC's members to all participants or beneficiaries of ERISA health plans. The result in the short term is a loss to the insurers because the premiums calculated on policies affected by that decision did not reflect the insurers' actual exposures for payment of medical bene-

fits. However, the long term result will be that coordinated no-fault coverage will not be available in Michigan to ERISA participants or beneficiaries. That will result in a substantial increase in the premiums paid by those persons for no-fault insurance. Both the short-term impact on its members and the long-term impact on its members' insureds are matters in which MAIC has a substantial interest.

## ARGUMENT

### THE SIXTH CIRCUIT'S DECISION IN THE INSTANT CASE WILL RESULT IN AN AGGREGATE ANNUAL INCREASE OF APPROXIMATELY $165 MILLION IN AUTOMOBILE INSURANCE PREMIUMS PAID BY MICHIGAN PARTICIPANTS AND BENEFICIARIES OF ERISA PLANS.

As the Sixth Circuit pointed out in the instant case, the fundamental purpose of the ERISA is to protect the interests of employee benefit plan participants and beneficiaries. (Petition for Writ of Certiorari, 10a). Ironically, that court's decision will result in a substantial increase in the premiums paid for no-fault automobile insurance by Michigan participants in ERISA plans, without any apparent net benefit to those participants.

In 1991,[1] 83% of full-time employees of medium to large private establishments[2] in this country were participants in employer-provided medical care plans. Current Labor Statistics, U.S. Bureau of Labor Statistics, Monthly Labor Review (December 1994), p 95. In

---

1 **The 1991 figures are the most current available from the U.S. Bureau of Labor Statistics.**

2 **That category includes all private sector establishments employing 100 workers or more in all industries. (Current Labor Statistics, U.S. Bureau of Labor Statistics, Monthly Labor Review [December 1994], p 95 n 1).**

1993,[3] the State of Michigan had an average annual employment of 4,374,000. Source: Michigan Employment Security Commission, Information and Reports Section. Assuming that Michigan workers participate in ERISA plans at the national rate,[4] 3,630,420 Michigan employees are ERISA plan participants.

In 1993, 5,488,966 policies of Michigan no-fault automobile insurance were issued. Source: Michigan Catastrophic Claims Association (see Appendix 2). Of those, approximately 75%, or 4,116,725 policies, provided coordinated medical coverage. (Appendix 2). The estimated total premium reduction for the purchase of coordinated policies in 1993 was between $200 million and $300 million. (*Id.*).

The Michigan No-Fault Act requires only that insurers offer the option of coordinating no-fault insurance with other health and accident coverage which is available to the insured if he is involved in an automobile accident.

> "An insurer providing personal protection insurance benefits shall offer, at a [*sic*] appropriately reduced premium rates, deductibles and exclusions *reasonably related to other health and accident coverage on the insured.*"

MCL 500.3109a; MSA 24.1309(1) (emphasis added).

---

**[3] In making the calculations set forth in the text, *Amicus Curiæ* opted to use the most current statistics available. Although using 1991 ERISA data with 1993 Michigan employment figures will necessarily result in some inaccuracy, *Amicus Curiæ* opted to do so in order to provide the best estimate of the *current* situation, rather than a more accurate calculation of the situation as it existed three years ago. Also, the text approach will require the substitution of only one figure to correct the inaccuracies when the 1993 ERISA figures become available from the U.S. Bureau of Labor Statistics.**

**[4] The Pension and Welfare Benefits Administration of the U.S. Department of Labor does not have a breakdown of the number of Michigan employees who are participants of ERISA health plans.**

It is self-evident that if the Sixth Circuit's decision is allowed to stand, a no-fault insured whose "other health and accident coverage" is an ERISA plan will not be able to purchase coordinated no-fault medical coverage. (The no-fault premium reduction "reasonably related" to the existence of an ERISA plan would be zero.) As a result, assuming that they currently purchase coordinated no-fault coverage at the same rate as the Michigan motoring public in general, Michigan ERISA plan participants will pay approximately $165 million per year in increased auto insurance premiums.

Nor does it follow that reversal of the Sixth Circuit's decision would result in those costs being simply passed back to Michigan ERISA participants in the form of increased employee contributions to plans or a reduction in benefits provided by those plans.

In the first place, the increase in costs to ERISA plans would not be equal to the cost of providing Michigan no-fault benefits. Michigan is the only state in this country which provides full lifetime medical benefits to victims of automobile accidents. Very few, if any, ERISA plans provide such extensive coverage. Consequently, the increased cost to a ERISA plan would only be that of affording the far more limited plan coverage to victims of automobile accidents. Michigan no-fault insurers would still pay the difference between that limited coverage and the total medical expenses incurred by the insured.

Second, any cost increase that would result would not necessarily be borne solely by Michigan ERISA participants. By hypothesis, COB or exclusion clauses rendering no-fault insurers primarily or exclusively responsible for medical benefits will affect only those

plans in states with no-fault automobile insurance systems.[5] In other states, such clauses are nullities.

However, the general or prevalent underwriting predicate of ERISA plans of firms doing business in other states as well as Michigan is unknown. If, as seems likely, such plans calculate their projected costs on the basis of their entire (multi-state) exposure for auto accident-related medical expenses, then the cost of requiring coverage for Michigan motor vehicle accidents would be spread over a premium base larger than one consisting only of Michigan insureds. The result is that the increased cost per Michigan ERISA participant would be diluted accordingly.

Consequently, to the extent that the foregoing is true, by requiring Michigan plan participants to bear the entire cost increase engendered by a reversal of the Sixth Circuit's decision in the instant case, employers would be imposing a disproportionate share of the cost on them. It should not be assumed that employers would act in such an arbitrary manner.

In short, it does not necessarily follow that reversing the Sixth Circuit's decision in the instant case will result in imposing on Michigan ERISA plan participants an additional $165 million in increased ERISA costs. It will, however, increase their no-fault insurance premiums by that amount. Thus, the net result of the Sixth Circuit's decision is a palpable and demonstrable economic

---

**[5] Although it is outside the scope of its interest in this case, *Amicus Curiæ* points out that in states with no-fault systems which provide very limited benefits, giving full effect to escape clauses such as Petitioner's will result in participants and beneficiaries receiving *less* than what the plan provides. That result is directly contrary to the Congressional intent of the ERISA. *Northeast Department ILGWU Health & Welfare Fund* v. *Teamsters Local Union No. 229 Welfare Fund*, 764 M. 2d 147 (3rd Cir. 1985).**

*detriment* to the very persons whom the ERISA was intended to protect.

Finally, in any event, even if we assume that the increased cost to ERISA plans would equal the amount of no-fault premium increases, *and* that they would all be passed back to Michigan ERISA plan participants, the net result would be an economic nullity. Participants would neither benefit nor suffer. And that would leave the Sixth Circuit's decision bereft of any basis in the Congressional intent.

## CONCLUSION

The Sixth Circuit's decision in the instant case will undeniably and substantially increase the automobile insurance premiums of ERISA plan participants and beneficiaries. Moreover, it will do so without any demonstrable net benefit to them. That being so, said decision is *contrary* to the Congressional intent in enacting the ERISA. This Court should grant certiorari for the purpose of reversing the decision of the Sixth Circuit in the instant case.

Respectfully submitted,

By: /s/ JAMES G. GROSS
*Counsel of Record*
*for Amicus Curiæ*

444 Penobscot Building
Detroit, Michigan 48226
(313) 963-8200

Dated: January 26, 1995

# APPENDICES TO BRIEF *AMICUS CURIÆ*

• • •

## APPENDIX 1

### 11/19/94 MEMORANDUM FROM TERRY BUCKLES TO JAMES GROSS

MAIC
MICHIGAN ASSOCIATION OF INSURANCE COMPANIES
404 Kalamazoo Plaza, Suite 100 — Lansing, Michigan 48933
517/482-1643 — Fax 517/482-0031

To: Jim Gross — FAX 313-964-6577

Re: Data survey for *Auto-Owners* v *Thorn Apple Valley*

From: Terry Buckles

Below is a detailed description of the data we plan to collect for your use. Please review and advise me by November 18 if this will not meet your needs. If I don't hear from you, we will proceed.

It is our intent, by the way, to seek participation of AAA, Auto-Owners, Citizens, State Farm and Allstate. Collectively, they control about 74% of the private passenger auto insurance market in Michigan.

**Data to be requested by private passenger auto coverage in Michigan during calendar years 1990, 1991, 1992, and 1993**

1. Number of vehicles insured
2. Number of insured vehicles with *coordinated medical benefits* PIP coverage
3. Direct written premium for the *medical benefits* portion of PIP coverage (excluding premium written for

replacement services, wage loss, funeral, etc., coverage)

4. Total premium reduction given to insureds for purchasing a policy with coordinated *medical benefits* PIP coverage

5. Total amount of claims paid and incurred for the *medical benefits* portion of PIP coverage (excluding claims paid under replacement services, wage loss, funeral, etc., coverage)

## APPENDIX 2

### 1/13/95 LETTER FROM TERRY BUCKLES TO JAMES GROSS

MAIC
MICHIGAN ASSOCIATION OF INSURANCE COMPANIES
404 Kalamazoo Plaza, Suite 100 — Lansing, Michigan 48933
517/482-1643 — Fax 517/482-0031

James G. Gross
Gross, Nemeth & Silverman, P.L.C.
444 Penobscot Building
Detroit, MI 48226-4018

January 13, 1995

Dear Jim:

Here is the information you requested for *Auto-Owners* v *Thorn Apple Valley*. It is not as precise or comprehensive as I had hoped. Not all of the insurers were able to provide the numbers as I had requested them; but I hope this will be satisfactory for your purposes.

Responses in items 2, 3 and 4 below are estimates developed from data provided by four insurer groups which write about 67 percent of the private passenger no-fault Personal Injury Protection (PIP) coverage for Michigan residents:

1. Private passenger (not including motorcycles) earned vehicle year exposures under Michigan no-fault in 1993 were 5,488,966. Source: Michigan Catastrophic Claims Association.

2. Estimated number of such exposures subject to coordination of PIP benefits during 1993: 4,116,724 or 75 percent.

3. Estimated dollar amount of premium reduction received by Michigan private passenger insureds for

the purchase of coordinated PIP coverage in 1993: $200 to $300 million.

4. Estimated dollar amount of paid (but not incurred) *medical* claims under Michigan private passenger PIP coverage during 1993: approximately $400 million.

Bill VonSeggern, Chief Actuary of AAA Michigan, has offered his assistance in drafting technical aspects of the brief. If you are interested, you can reach him at 313-462-7286.

Cordially,

Terry N. Buckles
President